UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

IRA SIMAN, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBERS DE-0351-98-0006-I-1 DE-0752-98-0055-I-1 DATE: NOV 23 1998

Ira Siman, Los Angeles, California, pro se.

Captain Paul W. Hurcomb, Esquire, Luke Air Force Base, Arizona, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that affirmed the agency's action demoting him by reduction in force (RIF), and dismissed for lack of jurisdiction his allegation of involuntary retirement. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 Effective December 10, 1995, the agency demoted the appellant from his GS-11 position of Pharmacist, to a GS-4 position of Medical Clerk, under RIF procedures. Initial Appeal File (IAF), Tab 6, Subtab 3D. He filed an equal employment opportunity (EEO) complaint, asserting that his RIF demotion was based on discrimination due to his national origin (Iranian) and age (60). *See id.*, Subtab 3B. After the agency issued a final decision denying his EEO complaint, *id.*, he timely filed this appeal and requested a hearing, IAF, Tab 1, *see also* IAF, Tab 4. Effective September 21, 1997, the appellant retired, IAF, Tab 3, Subtab 4A at 3, and filed an appeal asserting that his retirement was involuntary, IAF, Tab 10.

¶3 The administrative judge (AJ) joined the two appeals for consideration, under 5 C.F.R. § 1201.36(a)(2). IAF, Tabs 2, 12. After the appellant withdrew his hearing request, IAF, Tab 23, the AJ issued the initial decision affirming the RIF demotion, and dismissing for lack of jurisdiction the allegation of involuntary retirement, Initial Decision (ID), IAF, Tab 24. The appellant has timely filed a petition for review. Petition for Review (PR), Petition for Review File (PRF), Tab 1. The agency has not responded to the appellant's petition.

ANALYSIS

The RIF demotion

¶4 For the reasons discussed below, we find that the appeal must be remanded to afford the appellant further information regarding his right to a hearing and an opportunity to request a type of hearing other than an in-person hearing in Phoenix, Arizona.[1]

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[1] This pro se appellant does not appear to explicitly dispute on review the AJ's findings regarding the RIF demotion, but does raise vague contentions regarding the circumstances surrounding the demotion. PRF, Tab 1. Concurrent with the filing of the petition for review before the Board, the appellant filed a petition for review before the Equal Employment

¶5 In an order summarizing a status conference, the AJ stated:

> [T]here is some question as to the appellant's financial inability to attend a hearing in Phoenix, Arizona. I explained that the appellant could choose between attending the hearing in Phoenix, which, under Board policy, is the applicable fixed-hearing site and waiving his right to a hearing in these matters.

IAF, Tab 12. The AJ subsequently issued an order stating:

> Some time ago, the appellant telephoned to advise me that he would be submitting a written withdrawal of his request for a hearing because he could not afford to attend the scheduled hearing in Phoenix, Arizona.

IAF, Tab 19. In an order regarding closing the record, the AJ canceled the scheduled hearing, stating that "the appellant freely and voluntarily withdrew his request for a hearing," during a telephonic prehearing conference. IAF, Tab 23.

¶6 There is a strong policy consideration that an appellant receive a hearing on the merits of a case. *See Apiado v. Office of Personnel Management*, 58 M.S.P.R. 33, 35 (1993); *Sincero v. Office of Personnel Management*, 41 M.S.P.R. 239, 243 (1989). Here, the record evidence does not show that the AJ fully advised the appellant of his options regarding his right to a hearing, specifically, a hearing by telephone or, if appropriate, by video or at a location other than Phoenix. *See Apiado*, 58 M.S.P.R. at 35; *Brumley v. Department of Transportation*, 46 M.S.P.R. 666, 678 (1991), *overruled on other grounds by Hasler v. Department of the Air Force*, 79 M.S.P.R. 415 (1998); *Sincero v. Office of Personnel Management*, 41 M.S.P.R. 239, 243 (1989); 5 C.F.R. § 1201.51(d). Although this pro se appellant has not specifically raised hearing-related issues on review, we find that a remand is necessary for a fair adjudication of the case, to ensure that the appellant's right to a hearing is not unduly abridged. *See Brumley*,

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Opportunity Commission (EEOC). PRF, Tab 3. The petition before the EEOC raised specific arguments regarding the RIF demotion, but the petition was administratively closed due to the pending petition for review before the Board. *Id.*; PRF, Tab 5.

46 M.S.P.R. at 679; *Sincero*, 41 M.S.P.R. 243.

¶7 On remand, the AJ shall afford the appellant the option of a hearing by telephone, or, if appropriate, by video or at an alternate location. If the appellant requests a hearing, the AJ shall hold an appropriate type of hearing and shall issue a new initial decision on the appellant's RIF demotion and his related claims of discrimination. If the appellant waives his right to a hearing, despite being given these options, the AJ shall issue a new initial decision incorporating his findings in the original initial decision regarding the RIF demotion and related claims.

The alleged involuntary retirement

¶8 The appellant's retirement was precipitated by an agency decision dated April 3, 1997, to remove him for unacceptable work performance effective April 18, 1997. *See* IAF, Tab 17, Subtab 4C. The removal decision was never effected, however, and was withdrawn pursuant to an April 18, 1997 "Retirement Agreement" in which the parties agreed, inter alia, as follows: (1) the agency would withdraw its decision to remove the appellant; (2) he would submit a request for a voluntary retirement to be effective September 21, 1997; (3) he would be allowed to use all available sick and annual leave from April 7, 1997, and then would be placed on leave-without-pay status until his retirement, so that he may carry his health insurance coverage into retirement; and (4) he would "waive ... any and all rights to appeal, causes of action, complaints, or grievances associated with his voluntary retirement or th[e] Retirement Agreement." IAF, Tab 6, Subtab 3A.

¶9 Pursuant to the Retirement Agreement, the appellant retired effective September 21, 1997.[2] IAF, Tab 6, Subtab 3A at 3. To establish the Board's

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[2] On review, the appellant appears to challenge the agency's decision to remove him. PR at 3. We note that, under 5 U.S.C. § 7701(j), an employee may appeal an agency's decision to remove him, even where the removal decision was never implemented because the appellant retired in lieu of removal. *See, e.g., Anderson v. Small Business Administration*, 78 M.S.P.R.

jurisdiction over the alleged involuntary retirement under these circumstances, the appellant must first show that his waiver of Board appeal rights in the agreement was unenforceable. *See, e.g., Lopez v. U.S. Postal Service*, 71 M.S.P.R. 461, 464 (1996). In addition, he must show that his retirement was involuntary, i.e., that it was obtained through duress, coercion, or misrepresentation by the agency. *See, e.g., Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991).

¶10 To show that his waiver of appeal rights is unenforceable, the appellant must show that: He complied with the agreement, but the agency breached it; he did not voluntarily enter into the agreement; or the agreement was a result of fraud or mutual mistake. *See Link v. Department of Treasury*, 51 F.3d 1577, 1582-83 (Fed. Cir. 1995); *Smith v. Department of Veterans Affairs*, 78 M.S.P.R. 594, 597 (1998); *Lopez*, 71 M.S.P.R. at 464. Because the appellant retired pursuant to the terms of his Retirement Agreement with the agency, the second jurisdictional issue--whether his retirement was involuntary--is inextricably intertwined with the first jurisdictional issue involving the validity and enforceability of the settlement agreement..

¶11 The AJ's jurisdictional notice informed the appellant that his retirement must have resulted from duress, coercion, or misrepresentation by the agency. Appeal File in Docket No. DE-0752-98-0055-I-1, Tab 2. The appellant was not informed that he may establish the Board's jurisdiction by showing that: He complied with the Retirement Agreement, but the agency breached it; he did not voluntarily enter into the agreement; or the agreement was a result of fraud or mutual mistake. It is

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518, 521 (1998) (citing *Mays v. Department of Transportation*, 27 F.3d 1577, 1579-81 (Fed. Cir. 1994)). We find, however, that section 7701(j) is not applicable here and that the removal decision is beyond the Board's jurisdiction because the agency withdrew the removal decision before the appellant filed this appeal. *See Cooper v. Department of the Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997) (post-appeal rescission of removal action deprived the Board of jurisdiction, notwithstanding 5 U.S.C. § 7701(j)); *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981) (the Board's jurisdiction is determined by the nature of an agency's action against a particular appellant at the time an appeal is filed with the Board).

a somewhat close question whether the AJ's jurisdictional notice addressing duress, coercion, and misrepresentation was sufficient under the circumstances, even though it did not specifically address the validity and enforceability of the Retirement Agreement.[3] *Cf. Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). In light of the appellant's pro se status, and given that this appeal is being remanded for other reasons, we find that the appellant should be given another opportunity, including a hearing if appropriate, to establish the Board's jurisdiction over his alleged involuntary retirement. *See Smith*, 78 M.S.P.R. at 599; *Trotta v. U.S. Postal Service*, 73 M.S.P.R. 6, 11 (1997); *cf. Burgess*, 758 F.2d at 643 (an appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an allegedly involuntary retirement only if he makes a nonfrivolous allegation casting doubt on the presumption of voluntariness).

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[3] The agency's motion to dismiss, the initial decision, and the appellant's arguments below and on review similarly do not focus on the parties' agreement. IAF, Tab 10 (the appellant alleged below that he was "forced to retire" because agency officials threatened to "kick [him] out" if he did not retire), Tab 22 (agency's motion to dismiss); PRF, Tab 1 (the appellant argues on review that his retirement was involuntary because of various circumstances surrounding his demotion in 1995 and his inadequate job performance); *cf. Fidler v. U.S. Postal Service*, 53 M.S.P.R. 440, 444 (1992) (an AJ's failure to issue an adequate jurisdictional notice may be nonprejudicial to the appellant's substantive rights where the agency's motion to dismiss set forth the relevant jurisdictional issues).

ORDER

¶12 Accordingly, we remand the appeal for further proceedings as discussed above.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.